Office-Supreme Court, U.S.
FILED
JUN 25 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 237

STATE OF ILLINOIS,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, ET AL.,

Respondents-Plaintiffs,

AND

ALLIS-CHALMERS MANUFACTURING COMPANY, ET AL.,

Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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June 24, 1963.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on the 1st day of April, 1963.

OPINIONS BELOW.

The opinion of the District Court is reported at 207 F. Supp. 252, and reproduced herein as Appendix A, at p. 11, *infra*. The opinion of the Court of Appeals is reported at 315 F. 2d 564, and reproduced herein as Appendix B, at p. 20, *infra*.

JURISDICTION.

The judgment of the United States District Court for the Northern District of Illinois denying petitioner's intervention was entered on June 18, 1962. The judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was entered on April 1, 1963. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Was it error to hold that, as a matter of law, consumers of public utilities services whose rates have been increased because the utilities were overcharged for electrical equipment, in violation of the antitrust laws, have no claims against the suppliers of electrical equipment because of the increased charges they paid?
2. Were the consumers of public utilities and the State of Illinois properly denied intervention in a suit by the utilities against suppliers of electrical equipment under the antitrust laws? The effect of such exclusion of the consumers must be either (a) exoneration of the viola-

tors of the antitrust laws on the ground that the utilities passed on the loss to the consumers or (b) a windfall to the utilities who have passed on the illegal costs to the consumers?

STATUTES INVOLVED.

Section 4 of the Clayton Act, 15 U. S. C. §15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rule 24 of the Federal Rules of Civil Procedure:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. . . ."

STATEMENT.

On July 31 and October 6, 1961, complaints were filed in the United States District Court for the Northern District of Illinois by several public utilities against the defendant electrical equipment manufacturers alleging violations of the federal antitrust laws by combinations and conspiracies to fix prices, allocate markets, and submit collusive bids. The effect of these price-fixing conspiracies, it was alleged, was the creation of "high and artificial levels" of prices for electrical equipment purchased by the plaintiff public utilities. (R. 13.)

There were eighteen such complaints filed involving two groups of public utilities and relating to nine different lines of electrical equipment. All of these cases—and many similar cases filed throughout the country—arose out of the United States' antitrust actions generally known as the Philadelphia Electrical Conspiracy Cases.

Among the plaintiffs are four public utilities operating in the State of Illinois: Commonwealth Edison Company, Central Illinois Electric & Gas Company, Central Illinois Light Company, and Iowa-Illinois Gas & Electric Company. These companies serve some 2,500,000 consumers of electric light and power.

On November 27, 1961, the Attorney General of Illinois sought to intervene in these proceedings on behalf of the consumers of electrical power in Illinois and on behalf of the State of Illinois, its agencies and public institutions, as consumers of electrical power supplied by these companies. On May 17, 1962, six months later, the District Court denied the petition for intervention, on the ground that the decision in these cases would not be *res judicata* as to the interests of the State and the people thereof and on the ground that

the rates for consumers having been fixed by the Illinois Commerce Commission the consumers have no remedy for overcharges attributable to violations of the federal antitrust laws.

The Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court but rested its judgment solely on the ground that the State of Illinois and the consumers of electrical power in the State "do not have any direct personal or pecuniary interest in these antitrust actions." It is from this judgment that the State of Illinois seeks relief from this Court by way of petition for certiorari.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals, in holding that the consumers of electric power in Illinois had no claim under the antitrust laws for the increased costs directly resulting from the excessive charges made by the manufacturers to the utilities, relied solely on *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156 (1922), and thus misconstrued and misapplied a decision of this Court, seriously distorting the law on a question of great importance to the administration of the antitrust statutes.

The *Keogh* case is clearly inapposite. There the charge was that the rates fixed by the Commerce Commission were themselves in violation of the antitrust laws because they were non-competitive. The alleged violations of the antitrust laws were there said to have been committed by the utilities in joining for the purpose of getting the rates made uniform. There is no claim in the instant case of the illegality under the antitrust laws of the rates fixed by the utilities commission. The contention of the State here is rather that the manufacturers—not the utilities—caused loss to the consumers by reason of the illegal price-fixing

activities that caused the utilities to pay higher costs, which higher costs were made part of the rate base and of operating expenses necessarily resulting in increased costs to the consumers.

The *Keogh* case rested in large measure on the proposition that the relief sought by the plaintiff would result in granting a preference of rates to the plaintiff which would clearly contradict the purpose and function of uniformity of rates fixed by the commission. Here there could be no such discriminatory result as dictated the result in *Keogh* since the State is acting on behalf of all the consumers in Illinois. The nature of this distinction and its importance is emphasized in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500 (1936), and *United States* v. *R. C. A.*, 358 U. S. 334, 337 (1959).

Keogh finally rested on the proposition that damages were speculative because there was no way of showing that the costs to the plaintiff there would have been lower in the absence of the alleged violation of the antitrust laws or that his profits would have been greater, since plaintiff's competitors would have fared equally well had the rates not been fixed. In the instant case the record and court below concede that the consumers of Illinois suffered increased costs as a result of the higher prices exacted from the utilities by the manufacturers in violation of the antitrust laws.

2. The Court of Appeals erroneously decided a novel and important question under the antitrust laws, *i.e.*, that injuries to consumers by reason of illegal price-fixing imposed on utilities are not compensable under the antitrust laws.

It might well be true that, in some instances, a violation of the antitrust laws by manufacturers that causes an increase in the price charged to dealers would give rise to no

claim on the part of the consumer. This Court has yet to treat of the problem. But, if this is the appropriate doctrine in some instances, it must be for one of two reasons. Either the illegal increase in price might be absorbed by the dealer and never passed on to the consumer or the consumer may be in a position to make purchases from another dealer who was not similarly imposed upon or who chose to absorb the cost of the illegal increase. In the instant case, however, the public utility consumer has no possibility of avoiding the imposition. The utility is itself a legal monopoly from whom the consumer must purchase his electric power if he is to get it at all. And the increased costs of equipment attributable to the violations of the antitrust laws have necessarily been included in the utility's operations, resulting directly in an increase in costs to the public utility customer represented by the petitioner herein. The lower courts remain uninstructed by this tribunal on the question when, if at all, consumers may assert their rights under the antitrust laws. This case affords a most appropriate vehicle for resolving that issue.

3. The Court of Appeals erroneously required the demonstration of a "direct personal or pecuniary interest in these antitrust actions" by the intervening consumers, which is equated with a showing of "direct proximate impact of the conspiracies on the consumers." By apparently requiring a direct purchaser relationship with the selling defendants, the Court of Appeals would deny protection to injured indirect purchasers of electrical equipment who were intended to be protected by the antitrust laws. These injured parties secured their electrical equipment through contractors who made direct purchases at conspiratorially fixed prices from the defendants and included such excess prices in the bids submitted to and accepted by the injured public or private agencies involved.

4. The lower court was patently in error in holding that because the rates imposed on the consumers were legally fixed by the Illinois Commerce Commission, the injury to the consumers was "not cognizable in these antitrust actions." In so holding, the Court of Appeals was in direct contradiction of the cases decided by this Court. Indeed, if it were not for the language of the Court of Appeals' decision it would be hard to believe that the decision asserted that the approval by the State utility commission conferred on the manufacturers an immunity against suit by the consumers. Not even national administrative agencies have been permitted to subvert the antitrust laws by their interposition, unless specifically sanctioned by Congress. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 31 U. S. Law Week 4650 (June 17, 1963); *United States* v. *R. C. A.*, 358 U. S. 334 (1959). It is hard, therefore, to comprehend the proposition that such immunity can be conferred by a state administrative agency.

5. The denial of intervention by the State of Illinois is in direct contravention of the purpose and function of Rule 24 promulgated by this Court, for intervention affords the State the sole avenue for protection of its interests and that of the consumers it represents.

It must be clear that unless the State of Illinois is permitted to intervene, the persons injured by the price-fixing conspiracy to which the defendants were parties will remain without remedy. For if the liability of the defendants is established, and the State is not permitted to intervene, one of two equally undesirable results must be brought about. In the event that the "passing on" defense were to succeed, the defendants would be permitted to avoid obligation for their violations of the antitrust laws by showing that the plaintiffs had been made whole by reason of their

inclusion of the additional costs in their rate base and operating expenses. In this event, the defendants in effect would be in position to say that the loss resulting from their wrongdoing was borne by the consumers and thus defendants need not reimburse the plaintiffs.

Admittedly, it is not clear that such a defense will succeed. The circuits are in direct conflict on the issue whether the "passing on" defense is a valid one in an antitrust suit. The Third Circuit has clearly held that it is not. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 281 F. 2d 481 (CA 3rd, 1960). The Ninth Circuit has held that such a defense is valid. *Wolfe* v. *National Lead Co.*, 225 F. 2d 427 (CA 9th, 1955); see also *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. 2d 580 (CA 8th, 1945).

In the event that it does not succeed, however, an equally undesirable result will necessarily follow, if the State is not made a party to the action. For then the utilities will be able to recover damages from the defendants for which they have already been made whole by their charges to the consumers represented by the State. They will thus receive not only treble damages from the defendants, but treble damages for a loss they did not suffer. And the only persons to have suffered a loss will be the consumers and they, by reason, of the action of the lower courts will not be permitted to recoup that loss at all. They could not be made whole by amendment of the rates to be charged in the future, for in fixing such rates the state utility commission is constitutionally forbidden to consider past profits or excess revenues. *Board of Public Utility Commissioners* v. *New York Tel. Co.*, 271 U. S. 23, 32 (1926). And the state commission's power to award reparations for excessive rates is confined to a one year limitation period. Ill. Rev. Stats. (1961), Ch. 111-2/3, § 76.

6. The Court of Appeals by requiring that the petitioner demonstrate that it can "bring a direct action against defendants" as a condition to the right to intervene in its somewhat cryptic opinion appears to embrace the proposition of the trial court that intervention must be denied because the State will not be bound by the judgment. Such reasoning is circular. *Res judicata* can serve as a bar only to persons who are parties, or privies to litigation. Thus every person seeking intervention can be denied access to the court on the ground that the action proceeding to judgment without him will not serve as *res judicata*. More important, however, is the fact that the district court's position is in direct conflict with the rulings of several circuits that have seen and rejected the fallacy of requiring that a person be denied intervention if the judgment will not be *res judicata*, including the Seventh Circuit. See, *e.g.*, *Clark* v. *Sandusky*, 205 F. 2d 915, 919 (CA 7th, 1953); *Ford Motor Co.* v. *Bizanz Bros., Inc.*, 249 F. 2d 22, 28 (CA 8th, 1957); *Kozak* v. *Wells*, 278 F. 2d 104, 110 (CA 8th, 1960).

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June 24, 1963.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.
For the Northern District of Illinois.
Eastern Division.

Commonwealth Edison Company, et al., *Plaintiffs*, vs. Allis-Chalmers Manufacturing Company, et al., *Defendants*, and related cases.	Civil Actions Nos. 61-C-1277 to 1285.
Central Illinois Light Company, et al., *Plaintiffs*, vs. Allis-Chalmers Manufacturing Company, et al., *Defendants*, and related cases.	Civil Actions Nos. 61-C-1688 to 1696.

MEMORANDUM ON MOTION OF THE STATE OF ILLINOIS TO INTERVENE AS PARTY PLAINTIFF.

These 18 actions filed by several electric public utilities seek treble damages under federal antitrust laws. The separately grouped defendants are charged with conspiratorial price fixing resulting in the establishment of higher non-

competitive prices in the sale of electrical equipment to the plaintiffs. The cases involved in the instant motion comprise two series filed along nine product lines covering power transformers, power switchgear assemblies, low-voltage power circuit breakers, distribution transformers, meters, condensers, circuit breakers, turbine-generator units, and power switching equipment. Four of the plaintiff utilities operate in Illinois. They are Commonwealth Edison Company, Central Illinois Electric & Gas Co., Central Illinois Light Co., and Iowa-Illinois Gas & Electric Co. (hereinafter referred to as plaintiffs).

Intervention is sought by the Attorney General of Illinois (1) on behalf of the citizens of the State, who were consumers of the four plaintiffs, to secure refunds out of any recoveries realized herein, and (2) on behalf of the State of Illinois, its agencies and public institutions, to present claims for damages allegedly involving questions of law and fact in common with those of the main actions.

INTERVENTION AS OF RIGHT.

The State of Illinois contends that the recovery of damages by these plaintiffs will create a fund for distribution subject to the disposition of this Court and in which plaintiffs' consumers have a direct interest. It further contends that by reason of this fund, it is entitled to intervene in behalf of the consumers as a matter of right because (1) the representation of the consumer interest by existing parties may be inadequate, and (2) the consumers may be bound by a judgment or order in this action.

The applicable part of Rule 24, Federal Rules of Civil Procedure states:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inade-

quate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

The State's theory as to the existence of the "fund" is that the rates and charges for services paid by the consumers were excessive because said rates were based, in part, upon plaintiffs' capital expenditures for electrical equipment for which excessive prices had been conspiratorially fixed. It concludes that that part of a recovery herein which is in the excess over a reasonable rate, constitutes a "fund" in which plaintiffs' consumers have an interest.

The State does not earnestly argue that the consumers will be bound by any judgment or order herein and readily admits that "plaintiffs' consumer-customers are not parties to this suit and, therefore, under the principles of *res judicata* are not bound, . . ." Its principal contention is predicated on the existence of a fund which it alleges is subject to the disposition of this Court. It is clear that the existence and amount of this "fund" must depend on a determination of what was a reasonable and legal rate during the period of the alleged conspiracy.

Since the plaintiffs are public utilities, they are subject to the jurisdiction of the Illinois Commerce Commission under the provisions of the Public Utilities Act, S. H. A. Ch. 111 2/3. The exclusive power for fixing reasonable rates lies in that body subject to the provided statutory review by the Illinois courts (*Peoples Gas Light Co.* v. *Slattery*, 373 Ill. 31 (1939); *Natural Gas Pipeline Co.* v. *Federal Power Comm'n*, 141 F. 2d 27 (7th Cir. 1944); *Tilney* v. *City of Chicago*, 134 F. 2d 682 (7th Cir. 1943)). If rates are alleged to be excessive or improper in any respect, com-

plains must be made to the State commission. There is a specific Illinois statute providing for recovery of "excessive" rates. The Public Utilities Act, § 72, S. H. A. Ch. 111 2/3, § 76, provides in part:

> "When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount."

The law is well settled in Illinois that the statutory remedy for reparations is the exclusive remedy of customers of a public utility who allege that the utility's rates are excessive (*Mandel Bros.* v. *Chicago Tunnel Term. Co.*, 2 Ill. 2d 205 (1954); *Terminal R. R. Ass'n.* v. *Pub. Utilities Comm'n.*, 304 Ill. 312 (1922), *Burke* v. *Illinois Bell Tel. Co.*, 348 Ill. App. 529 (1952); *American Generator & Armature Co.* v. *Commonwealth Edison Co.*, 298 Ill. App. 192 (1939); *Medusa Portland Cement Co.* v. *Ill. Cent. R. R.*, 287 Ill. App. 549 (1936); *Natural Gas Pipeline Co.* v. *Federal Power Comm'n., supra; Tilney* v. *City of Chicago, supra*).

In *Medusa Portland Cement Co.* v. *Ill. Cent. R. R. supra*, the Court stated the rule thus (at p. 561):

> "Since the enactment of the Public Utilities Act, sec. 72 thereof has provided the only method or remedy available in this State for determining whether rates charged by public utilities are fair and reasonable or unfair, unreasonable and discriminatory. This section of the act also authorizes the commission to award reparation to claimants if rates charged and exacted

of them are determined to have been excessive and discriminatory."

After citing several cases to the same effect, the Court, continuing, said (at p. 563):

> "It is manifest from these decisions, and they but follow the decisions of the United States Supreme Court construing similar provisions of the Interstate Commerce Act, that *no suit may be maintained in any court in Illinois to recover reparation for excessive or unjustly discriminatory rates unless and until the commission, acting under the authority conferred upon it by sec. 72, has heard a claim therefor, has found the rates the public utility charged to have been excessive or unjustly discriminatory, and has entered an order requiring the public utility to make due reparation.*" (Emphasis added.)

The Court in both *Burke* v. *Illinois Bell Tel. Co., supra,* and *American Generator & Armature Co.* v. *Commonwealth Edison Co., supra,* found support for the Illinois rule in a quotation from *Great No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285 (1922), where the Court stated thus (at p. 291):

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two

> classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

Inasmuch as the State seeks intervention of right on behalf of plaintiffs' consumers, it is evident that its rights cannot rise above theirs. The situation where a consumer seeks to reach a "fund" resulting from allegedly excessive rates charged by a utility is not novel in this Circuit. In *Natural Gas Pipeline Co.* v. *Federal Power Comm'n*, *supra*, the original suit arose by the petition of Natural Gas Pipeline Company for review of an order of the Federal Power Commission to reduce its rates. The Court of Appeals issued a stay order pending review, upon a bond filed to protect purchasers of gas at rates in excess of those prescribed by the Commission. Subsequently Natural Gas Pipelines Company filed reduced rates with the Commission, and in satisfaction of its obligation under the stay order, paid into court the six million dollar fund which had accumulated during the period of said stay order. Ultimately the fund was decreed to belong to the consumers of the several utilities to whom Natural Gas Pipeline Company furnished natural gas. After the fund had been distributed, a customer of Peoples Gas Light and Coke Company sought intervention for himself and all other customers similarly situated. Petitioner in that suit contended that since the cost of natural gas purchased by Peoples Gas from Natural Gas Pipelines Company had been reduced, and Peoples Gas had not reduced its retail rate pro tanto, he and other consumers were entitled to a refund

from Peoples Gas measured by said reduction. In dismissing the petition, the Court significantly said (at p. 29):

> "What petitioner now asks, is to have this court ascertain that there were excess collections from him and the amount thereof. But the only way that we could do this would be to usurp the functions of the Illinois Commerce Commission by fixing what we consider would have been a reasonable rate for Peoples Company to charge during the period in question, and the specific classes or classes of customers entitled to a refund by reason of the Company's charges in excess thereof. We refuse to do so because this court has no rate-making powers. [Citing cases.]"

Considering the exclusiveness of the statutory remedy for excessive rates, the similarity between the situation of the instant applicant and that of petitioner in Natural Gas Pipeline, and the binding authority of that case, this Court must conclude, as did the Court of Appeals in the latter case, that "The 'fund' or 'trust fund' which petitioner seeks to conjure up is entirely illusory."[1]

Judge Kilpatrick in *City of Philadelphia, et al.* v. *Westinghouse Electric Corp., et al.* (decided October 23, 1961) (D. C. E. D. Pa.) 1961 C. C. H. Trade Cases, ¶70, 143, in denying intervention to the State Public Utility Commission, said:

> "I think . . . that the consumer's interests, which are the only bases on which the application could be sustained, are entirely too remote to permit intervention in this case . . . I will deny the motion to intervene."

The motion as to intervention of right is denied.

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[1] See annotation, 18 A. L. R. 2d 1343 (1951), "Right of customers of public utility with respect to fund representing a refund from another supplying utility upon reduction of latter's rates."

PERMISSIVE INTERVENTION

The State of Illinois seeks to intervene as a purchaser of electrical equipment and contends that the State's claim and that of the main actions have questions of law and fact in common. The applicable part of Rule 24 Federal Rules of Civil Procedure is stated thus:

> "(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . *In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.*" (Emphasis added.)

A motion for permissive intervention is addressed to the sound discretion of the Court (*Sutphen Estates* v. *United States*, 342 U. S. 19 (1951); *Allen Calculators, Inc.* v. *Cash Register Co.*, 322 U. S. 137 (1944)). Although it is certainly not conclusive, the opposition of all the original parties to the main action to intervention is an element for the Court's consideration. The words of Rule 24(b) as underscored above are a caution to the Court so that in its zeal to avoid a multiplicity of suits it will not hamper or vex the claims of the original parties.

While it is apparent that the State's claim as to the issue of the conspiracy will present questions of law and fact in common with the main actions, this is not true as to the question of damages. Even assuming for the moment that defendants did engage in a conspiracy, each plaintiff herein must prove that it was damaged in its own property or business by paying higher prices and, lacking such proof, it cannot recover (*Keogh* v. *C. & N. W. Ry.*, 260 U. S. 156 (1922); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F 2d 967 (7th Cir. 1943)).

The State avers it has purchased, acquired, and used millions of dollars of electrical equipment in the operation

of: 73 hospitals, sanitoria, clinics, and schools, 5 penal institutions, 11,932 miles of highways, 167 miles of expressways and 87 miles of toll roads using extensive electrical structures, facilities, and devices; 65 state parks, lodges, facilities, and fair grounds, plus armories, office and service buildings. The applicant readily admits that "additional trial time will be involved." The size and complexity of the instant two series of cases are manifest. When it is considered that the State intends to bring to suit claims as to an enormous number of purchases, requiring separate proof of damages, including the time, amount and nature of, and prices paid for the purchases made, it is plain that the instant suits will approach unmanageable proportions both in preparation and trial. Applicant further admits that intervention will involve a proportionate increase in the number of witnesses required. A similar situation was aptly characterized by Judge Wyzanski in *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore*, 51 F. Supp. 972 (D. C. Mass. 1943), where he said (at p. 973):

> "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair."

The Court has carefully weighed and examined all the factors involved and is of the opinion that to permit intervention by the State will unduly delay and prejudice the adjudication of the rights of the original parties.

The motion for permissive intervention on behalf of the State of Illinois is therefore denied, and counsel for plaintiffs will prepare the necessary order.

EDWIN A. ROBSON,
Judge.

May 17, 1962

APPENDIX B.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 13904. SEPTEMBER TERM, 1962 JANUARY SESSION, 1963

Commonwealth Edison Company, et al.,
Plaintiffs-Appellees,
vs.
Allis-Chalmers Manufacturing Company, et al.,
Defendants-Appellees,
and
State of Illinois,
Appellant-Applicant for Intervention.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 1, 1963

Before HASTINGS, *Chief Judge*, KNOCH and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Among the plaintiffs in eighteen related antitrust suits filed below charging defendants, electrical equipment manufacturers, with conspiracy to fix prices, allocat[illegible] markets and submit collusive bids, are four public utilities operating in the State of Illinois, namely,

Commonwealth Edison Company, Central Illinois Electric and Gas Co., Central Illinois Light Company and Iowa-Illinois Gas and Electric Company. (These four Illinois public utilities will hereinafter be referred to as plaintiffs). Plaintiffs serve some 2,500,000 consumers with electric light and power.

The district court's original jurisdiction was invoked under Section 1 of the Sherman Act and Sections 4, and 5(b) of the Clayton Act (15 U. S. C. §§ 1, 15, and 16(b)). The effect of these price fixing conspiracies, it is alleged, was the creation of "high and artificial levels" of prices for the electrical equipment purchased by plaintiffs. All of these cases arise out of the so-called Philadelphia Electrical Conspiracy Cases.

The Attorney General of Illinois seeks to intervene in these proceedings for the State of Illinois. Intervention is sought as of right in order to represent and protect the interests of the public consumers of plaintiffs who it is claimed were injured by defendants' price fixing conspiracies in that plaintiffs were caused to pay high and artificial prices for electrical equipment used in its utility operations, which excessive prices were in turn collected from the public consumers through higher utility rates.

The State of Illinois in support of its motion for intervention urges that it has in behalf of the public consumers a direct interest in the recoveries which may be realized in these proceedings and that its participation is necessary to effectuate a proper and equitable distribution among the injured parties of any monies or fund so recovered. It is further urged that, "The representation of this public interest by existing parties may be inadequate and the applicant may be bound by a judgment or order in the action."

Permissively, the Attorney General seeks to intervene on behalf of state agencies and institutions which have made purchases from defendants of the involved electrical equipment during the period of the conspiracy. It is alleged that the claims arising from these purchases present questions of law and fact which are common to the main action.

Both plaintiffs and defendants oppose the motion of the State of Illinois to intervene.

The district court denied the State's application for intervention both as of right and permissively. The district judge's memorandum stating his reasons for the ruling appears in 207 F. Supp. 252.

This appeal was taken in the first of these eighteen related cases under a stipulation among the parties that this court's determination in this appeal shall govern the matter of intervention by the State of Illinois in all of the related cases.

1. Intervention As of Right.

We agree that the district judge was correct in not allowing the State of Illinois by its Attorney General to intervene in behalf of the consumers of the four public utility plaintiffs; we reach that result, however, for a different reason.

The primary essential element that must exist for an applicant to intervene in a pending action as of right under Rule 24(a) Fed. R. Civ. P. is that he have a direct personal or pecuniary interest in the subject of the litigation; in this, the mandatory provisions differ from the permissive under Rule 24(b) Fed. R. Civ. P. See *Securities Comm'n. v. U. S. Realty Co.*, 310 U. S. 434, 459 (1940). All other essential elements, *i. e.*, "representation of the ap-

plicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" (Rule 24(a)(2)), as well as "the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court. . . ." (Rule 24(a)(3)), are secondary to the existence of a direct personal or pecuniary interest in the subject of the litigation by the applicant for intervention as of right.

We hold that the State of Illinois as agents or *parens patriae* of the consumers (accepting arguendo that the State of Illinois can properly assume such role) or even the consumers themselves do not have any direct personal or pecuniary interest in these antitrust actions. Our holding renders moot any discussion of the existence of the subsumed secondary elements. The rationale for our holding follows.

The interests of plaintiffs and the consumers are different and arise from separate though related operative facts. The legal interest of plaintiffs which they are attempting to vindicate in these actions arises under the federal antitrust statutes. The damages, if any, to which they are entitled are measured by the hurt they may have suffered by reason of the alleged conspiracies claimed to be violative of the antitrust laws. That hurt is measured by the excessive prices they claim were paid for equipment purchased from defendants. The alleged conspiracies spent themselves on these purchasers. The aftereffects of the hurt on the consumers are consequential and too remote for the consumers to gain rights against the conspirators.

The consumers' rights, if any, to reparation for their consequential hurt arise from higher rates and charges for services provided by plaintiffs. That is the proximate

cause of their injury, not the antitrust violation. See *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922). The consumers' rights do not penetrate through to the antitrust conspiracies.

To put it differently, the question whether the State of Illinois, in behalf of the consumers, can as of right intervene may be answered by posing another question which underlies and is vital to the first. The underlying question is: Could the State of Illinois bring a direct action against defendants? The answer is "no", because there was no direct proximate impact of the conspiracies on the consumers. The impact on them was remote and took the shape of allegedly higher rates paid for utility services—rates established as legal by the Illinois Commerce Commission. Although these rates may be determined to have been unreasonable because of conspiratorially fixed equipment costs which went into the basic rate structure, that is another issue not cognizable in these antitrust actions.

We do not feel called upon to determine whether such issue embraces legally vindicable rights possessed by the consumers or what means of recovery, if any, should be pursued. All we are deciding is that the consumers' rights may not be asserted in these antitrust actions.

The State of Illinois, by asking to intervene in behalf of the consumers, is in effect attempting under the guise of intervention to substitute itself in the role of protector of the consumers' interests for plaintiffs, in part at least, as the aggrieved party in these antitrust actions; or what seems more likely, is tendering a collateral issue having its genesis outside the antitrust laws.

In either event, the asserted mutuality of antitrust interest is lacking; hence, the State of Illinois fails to satisfy the mandatory intervention prerequisites of Rule 24 Fed. R. Civ. P.

II. Permissive Intervention.

We find no abuse of discretion in the district court's denial of the State of Illinois' motion for permissive intervention as a purchaser of defendants'-products that has suffered damage by reason of the alleged conspiracies. In support of its motion to intervene, the State claims common issues of law and fact. As stated by the district judge in his memorandum, "While it is apparent that the State's claim as to the issue of the conspiracy will present questions of law and fact in common with the main actions, this is not true as to the question of damages."

The State may start an independent action against defendants if it chooses. At that time the district court may decide in its sound discretion whether the State's action should be consolidated for trial with the pending actions.

The order denying the motion of the State of Illinois to intervene as a party plaintiff, both as of right and permissively, is Affirmed.